Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-21–69 OF 2006
RAJA AHMAD MOHZANUDDIN SHAH JC
24 NOVEMBER 2023

Tort — Damages — Assessment — Misstatement — Land fraud — Appeal against aassessment of damages — Whether Deputy Registrar correct in assessment of damages — Whether damages recoverable must be assessed at date when tort was committed — Whether fifth defendant entitled to claim for market value of land at time of signing sale and purchase agreement — Whether fifth defendant could claim market value of a land and also demand damages for lost profits — Whether fifth defendant entitled to damages for wrong committed — Whether fifth defendant should be placed in same position as would have been if fraud had never occurred — Whether unjust enrichment ought to be avoided — Whether interest should be imposed from date of award of damages — Rules of Court 2012, O 42 r 12

The present dispute arose from a land fraud that occurred during the computerisation exercise at the Federal Territory of Kuala Lumpur land office. As part of the modernisation of land administration, the first defendant was responsible for uploading land details into the computer system from a manual record. However, a mistake was made affecting the plaintiff's land when the officer in charge entered the fourth defendant's name into the system instead of the plaintiffs. She mistakenly entered 'Liptown Properties Sdn Bhd' instead of 'Uptown Properties Sdn Bhd' when keying in the plaintiff's name. It turned out that Lipton Properties Sdn Bhd which was named as the fourth defendant did not exist. This error reached the ears of the fraudster, who exploited it to obtain computerised title to the land in dispute. The fraudster then sold the property to the fifth defendant. Following the sale and purchase of the land in December 2004, the plaintiff, as the original owner, became aware of the fraudulent transaction, resulting in a complaint and caveat being registered. Meanwhile, in order to obtain financing for the land's purchase, the fifth defendant charged the land to the sixth defendant. The plaintiff then filed a civil suit. Following the trial, the High Court ordered the land to be returned to the plaintiff due to the negligence of the first defendant. Both the fifth defendant and the sixth defendant had then taken out notices of contribution against the first, second and third defendants as a consequence of such negligence. The notices of contribution were granted by the High Court in favour of the fifth and sixth defendants against the first, second and third defendants, with damages to be assessed by the Deputy Registrar. Accordingly,

the Deputy Registrar: (a) disallowed the claim for compensation for the loss of land at market value but granted nominal damages of RM2m; (b) denied the claim for loss of profit; (c) allowed exemplary damages of RM500,000 which accounted for 25% of the nominal damages awarded, as opposed to the sum of RM13m claimed by the fifth defendant; (d) allowed the fifth defendant to claim stamp duty and legal fees for the SPA, MOT and loan documentation; and (e) disallowed interest on damages. Being dissatisfied with the Deputy Registrar's assessment of damages, two appeals were filed. The fifth defendant appealed against the entire assessment, whilst the first, second and third defendants appealed against the damages award of RM3,353,603.75 that they were ordered to pay to the fifth defendant. The fifth defendant argued that they were entitled to the entire amount of damages claimed in the sum of RM77,265.883.75 instead of RM3,353,603.75 as awarded by the Deputy Registrar. On the contrary, the first, second and third defendants argued that the fifth defendant was not entitled to anything.

Held, allowing both the parties' notices of appeal partially:

(1) The question of liability could not be reopened during the assessment of damages as it would constitute res judicata. As the trial judge had already determined, the first, second and third defendants did owe a duty of care, amongst another, to the fifth defendant, the next step was to determine whether the fifth defendant was entitled to the damages asked for and, if so, what quantum of damages it should receive. On the facts of the case, the fifth defendant was only entitled to claim the market value of the land at the time of signing the SPA rather than the date of judgment after trial. As a general rule of law, damages recoverable must be assessed at the date when the tort was committed, which in this case was on 14 September 2004 (see paras 15–16 & 20).

(2) It was not long before the fifth defendant became aware of the fraud. This was due to the fact that they knew or should have known from the moment the caveat was entered that the transaction was forged. Also, the fifth defendant was not tricked out of his property or land. It was almost immediately apparent to the fifth defendant that the fraud had taken place when they bought the land in question. This meant that it could not be based on the judgment date. It had to be the date when the fifth defendant was led to believe that the transaction was legitimate and valid. The extent to which the fifth defendant was unaware of the fraud only lasted for that time period. In this instance, the fifth defendant was only the purchaser of the land. it would be considered a tort of misstatement. Considering the government was held liable for the tort of misstatement, the breach occurred at the time of signing the SPA (paras 23–24).

(3) On the issue of which valuation report the court should consider when determining the land's value in 2004, the court was inclined towards the

valuation report prepared by Firdaus & Associates dated 7 July 2004 for RM15m. The valuation report by Firdaus & Associates represented a more reasonable and appropriate basis due to the fact that the fifth defendant must be placed in a position corresponding to what they would have been if the tort had not occurred (para 27).

(4) The court disagreed with the Deputy Registrar's findings that despite the fifth defendant's failure to prove damages, the Deputy Registrar nonetheless proceeded to award nominal damages of RM2m. The appeals did not appear to be such a case where the fifth defendant failed to prove damages or where there was no evidence for the court to consider. It was unavoidable that the fifth defendant suffered losses as a result of this whole affair. It was therefore necessary to compensate the fifth defendant since the SPA could be treated as a pointless exercise (see paras 28–29).

(5) The fifth defendant could not claim the market value of the land of RM52m and then also demand damages for lost profits of RM11.4m on the ground that the opportunity to develop the land was lost. In the specific circumstances of this case and the manner in which the fifth defendant was claiming, it was not possible to claim both damages concurrently. Furthermore, the idea of selling and redeveloping the land once again was too remote. If the fifth defendant was allowed to claim as such, the recovery would be double, aside from the fact that it would also be unjust enrichment on its part (para 30).

(6) The fifth defendant was entitled to damages for the wrong that was committed against it. To this end, the damages payable to the fifth defendant as opposed to the award of the Deputy Registrar were: (a) loss of value of the land at the time the tort was committed against the fifth defendant: RM15m; (b) stamp duty: RM354,000; (c) legal fees (SPA and MOT): RM46,000; and (d) legal fees (loan documentation): RM99,603.75. The added amounts of (a) until (d) were to be deducted from the amount paid to the sixth defendant: RM12,286.761.07. Therefore, the total of damages payable by the first, second and third defendants to the fifth defendant was RM3,212,842.68. The court did not award exemplary damages since none of the first, second and third defendants' conducts were outrageous enough to warrant punishment by way of exemplary damages. Additionally, the stamp duty amount of RM354,000 as claimed by the fifth defendant was justified due to the fact that it was incurred by the fifth defendant (see paras 31–32 & 34).

(7) Even though the fifth defendant was not entitled to buy a new piece of land in 2012, they had nevertheless sufficiently compensated for the profit of RM3m as awarded. It was an over-the-air profit that did not require any new land to be developed. As a result, the fifth defendant had been placed in the same position as they would have been if the fraud had

never occurred. As for the imposition of interest from the date of the award of damages by the learned Deputy Registrar on 15 October 2021, this was the point at which the precise amount of damages becomes apparent. This was further supported by the fact that when the trial judge allowed the fifth defendant's notice of contribution, the questions of the damages recoverable and their remoteness were still uncertain until the Deputy Registrar delivered the assessment award. Therefore, the court took the award date to be the date from which interest would be imposed according to O 42 r12 of the Rules of Court 2012 (see paras 36–37).

[Bahasa Malaysia summary

Pertikaian ini adalah disebabkan oleh penipuan tanah yang berlaku semasa proses pengkomputeran di pejabat tanah Wilayah Persekutuan Kuala Lumpur. Sebagai sebahagian dari pemodenan pentadbiran tanah, defendan pertama bertanggungjawab memuat naik butiran tanah ke dalam sistem komputer dari rekod manual. Walau bagaimanapun, kesilapan berlaku yang melibatkan tanah plaintif apabila pegawai bertanggungjawab memasukkan nama defendan keempat ke dalam sistem dan bukannya plaintif. Dia tersilap memasukkan 'Liptown Properties Sdn Bhd' dan bukannya 'Uptown Properties Sdn Bhd' ketika memasukkan nama plaintif. Telah didapati bahawa Lipton Properties Sdn Bhd yang dinamakan sebagai defendan keempat tidak wujud di dalam sistem. Kesilapan ini diketahui oleh di penipu, yang kemudiannya mengambil kesempatan dengan mendapatkan hak milik di dalam sistem berkomputer ke atas tanah tersebut. Si penipu kemudiannya menjual harta itu kepada defendan kelima. Selepas penjualan dan pembelian tanah pada Disember 2004, plaintif sebagai pemilik asal, menyedari transaksi penipuan itu dan membuat laporan serta memasukkan kaveat. Sementara itu, untuk mendapatkan pembiayaan bagi pembelian tanah itu, defendan kelima mencagarkan tanah itu kepada defendan keenam. Plaintif kemudian memfailkan saman sivil. Selepas perbicaraan, Mahkamah Tinggi memerintahkan tanah itu dikembalikan kepada plaintif kerana kecuaian defendan pertama. Kedua-dua defendan kelima dan defendan keenam kemudiannya telah mengeluarkan notis sumbangan terhadap defendan pertama, kedua dan ketiga akibat dari kecuaian tersebut. Notis sumbangan telah dibenarkan oleh Mahkamah Tinggi yang memihak kepada defendan kelima dan keenam terhadap defendan pertama, kedua dan ketiga, dengan ganti rugi akan dinilai oleh Timbalan Pendaftar. Sehubungan itu, Timbalan Pendaftar: (a) tidak membenarkan tuntutan pampasan kehilangan tanah pada nilai pasaran tetapi memberikan ganti rugi nominal sebanyak RM2 juta; (b) menolak tuntutan kehilangan keuntungan; (c) membenarkan ganti rugi teladan sebanyak RM500,000 sebanyak 25% dari ganti rugi nominal yang diberikan, berbanding jumlah RM13 juta yang dituntut oleh defendan kelima; (d) membenarkan defendan kelima menuntut duti setem dan yuran guaman untuk SPA, MOT dan dokumentasi pinjaman; dan (e) faedah tidak dibenarkan ke atas ganti rugi. Kerana tidak berpuas hati dengan penilaian ganti rugi Timbalan Pendaftar, dua rayuan telah difailkan.

Defendan kelima merayu terhadap keseluruhan taksiran, manakala defendan pertama, kedua dan ketiga merayu terhadap jumlah ganti rugi sebanyak RM3,353,603.75 yang diperintahkan untuk dibayar kepada defendan kelima. Defendan kelima berhujah bahawa mereka berhak mendapat keseluruhan amaun ganti rugi yang dituntut sebanyak RM77,265.883.75 dan bukannya RM3,353,603.75 seperti yang diberikan oleh Timbalan Pendaftar. Sebaliknya, defendan pertama, kedua dan ketiga berhujah bahawa defendan kelima tidak berhak mendapat sebarang ganti rugi.

Diputuskan, membenarkan rayuan kedua-dua pihak secara sebahagian:

(1) Persoalan liabiliti tidak boleh dinilai semula semasa penilaian ganti rugi kerana ianya akan menyebabkan res judicata. Seperti yang telah diputuskan oleh hakim perbicaraan, defendan pertama, kedua dan ketiga mempunyai kewajipan berhati-hati, antara lain, kepada defendan kelima, langkah seterusnya adalah untuk menentukan sama ada defendan kelima berhak mendapat ganti rugi yang dipohon dan, sekiranya ya, berapa jumlah kuantum ganti rugi yang harus diterimanya. Berdasarkan fakta kes itu, defendan kelima hanya berhak menuntut nilai pasaran tanah ketika SPA ditandatangani dan bukannya pada tarikh penghakiman selepas perbicaraan. Menurut prinsip undang-undang umum, ganti rugi yang boleh diberikan haruslah dinilai pada tarikh tort dilakukan, yang mana di dalam kes ini adalah pada 14 September 2004 (lihat perenggan 15–16 & 20).

(2) Tidak lama kemudian defendan kelima menyedari penipuan tersebut. Hal ini disebabkan oleh fakta bahawa mereka tahu dari saat kaveat dimasukkan bahawa transaksi itu dipalsukan. Juga, defendan kelima tidak ditipu berkenaannya tanahnya. Adalah jelas kepada defendan kelima bahawa penipuan itu berlaku apabila mereka membeli tanah berkenaan. Oleh itu, kerugian tidak boleh berdasarkan tarikh penghakiman. Ianya mestilah dari tarikh apabila defendan kelima mempercayai bahawa transaksi itu sah. Sejauh mana defendan kelima tidak menyedari penipuan itu hanya bertahan untuk tempoh masa itu. Dalam hal ini, defendan kelima hanyalah pembeli tanah itu. Ianya akan dianggap sebagai tort salah nyata. Memandangkan kerajaan dipertanggungjawabkan atas tort salah nyata, pelanggaran itu berlaku pada masa SPA ditandatangai (perenggan 23–24).

(3) Mengenai isu laporan penilaian yang perlu dipertimbangkan oleh mahkamah semasa menentukan nilai tanah pada tahun 2004, mahkamah cenderung kepada laporan penilaian yang disediakan oleh Firdaus & Associates bertarikh 7 Julai 2004 dengan jumlah nilaian sebanyak RM15 juta. Laporan penilaian oleh Firdaus & Associates mempunyai asas yang lebih munasabah dan sesuai kerana fakta bahawa defendan kelima mesti diletakkan dalam kedudukan yang sepadan

dengan apa yang akan mereka lakukan sekiranya tort itu tidak berlaku (perenggan 27).

(4) Mahkamah tidak bersetuju dengan penilaian Timbalan Pendaftar bahawa walaupun defendan kelima gagal membuktikan ganti rugi, Timbalan Pendaftar tetap meneruskan untuk memberikan ganti rugi nominal sebanyak RM2 juta. Rayuan-rayuan itu tidak berdasarkan kes di mana defendan kelima gagal membuktikan ganti rugi atau di mana tiada bukti untuk dipertimbangkan oleh mahkamah. Tidak dapat dielakkan bahawa defendan kelima mengalami kerugian akibat keseluruhan transaksi ini. Oleh itu, adalah perlu untuk memberi pampasan kepada defendan kelima kerana SPA boleh dianggap tidak membantu (lihat perenggan 28–29).

(5) Defendan kelima tidak boleh menuntut nilai pasaran hartanah sebanyak RM52 juta dan kemudian menuntut ganti rugi bagi kehilangan keuntungan sebanyak RM11.4 juta atas alasan peluang untuk membangunkan tanah itu telah hilang. Dalam keadaan khusus kes ini, adalah tidak mungkin untuk kedua-dua ganti rugi dituntut secara serentak. Tambahan pula, idea untuk menjual dan membangunkan semula tanah itu sekali lagi terlalu jauh. Sekiranya defendan kelima dibenarkan untuk menuntut sedemikian, tuntutan akan menjadi dua kali ganda dan ianya juga akan menjadi pengkayaan yang tidak adil (perenggan 30).

(6) Defendan kelima berhak mendapat ganti rugi atas kesalahan yang dilakukan terhadapnya. Untuk tujuan ini, ganti rugi yang perlu dibayar kepada defendan kelima berbanding dengan award Timbalan Pendaftar adalah: (a) kehilangan nilai tanah pada masa tort dilakukan terhadap defendan kelima: RM15 juta; (b) duti setem: RM354,000; (c) yuran guaman (SPA & MOT): RM46,000; dan (d) yuran guaman (dokumentasi pinjaman): RM99,603.75. Jumlah tambahan (a) hingga (d) hendaklah ditolak daripada jumlah yang dibayar kepada defendan keenam: RM12,286.761.07. Oleh itu, jumlah ganti rugi yang perlu dibayar oleh defendan pertama, kedua dan ketiga kepada defendan kelima adalah sebanyak RM3,212,842.68. Mahkamah tidak memberikan ganti rugi teladan kerana tiada satu pun daripada kelakuan defendan pertama, kedua dan ketiga yang cukup keterlaluan untuk mewajarkan ganti rugi teladan. Selain itu, jumlah duti setem sebanyak RM354,000 seperti yang dituntut oleh defendan kelima adalah wajar kerana ianya ditanggung oleh defendan kelima (lihat perenggan 31–32 & 34).

(7) Walaupun defendan kelima tidak berhak membeli sebidang hartanah baru pada tahun 2012, mereka tetap mendapat pampasan secukupnya untuk keuntungan sebanyak RM3 juta seperti yang diberikan. Ianya adalah keuntungan atas angin yang tidak memerlukan sebarang hartanah

baru untuk dibangunkan. Akibatnya, defendan kelima telah diletakkan dalam kedudukan yang sama seperti sekiranya penipuan itu tidak pernah berlaku. Bagi faedah dari tarikh pemberian ganti rugi oleh Timbalan Pendaftar terpelajar pada 15 Oktober 2021, ini adalah di mana jumlah ganti rugi adalah jelas. Hal ini disokong lagi oleh fakta bahawa apabila hakim perbicaraan membenarkan notis sumbangan defendan kelima, persoalan ganti rugi yang boleh dipulihkan dan kejauhannya masih tidak jelas sehingga Timbalan Pendaftar memberikan gantirugi taksiran. Oleh itu, mahkamah mengambil tarikh award sebagai tarikh dari mana faedah dikenakan menurut A 42 k 12 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 36–37).]

Cases referred to

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105; [1985] 1 MLRA 479, PC (refd)

Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals [2004] 4 MLJ 105; [2004] 1 MLRA 832, CA (refd)

Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713; [2012] 3 CLJ 271, HC (refd)

Legislation referred to

Rules of Court 2012 O 42 r 12

Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the first, second and third defendants.

Goik Kenwayne (with H'ng Yen Jun) (Dennis Nik & Wong) for the fifth defendant.

Raja Ahmad Mohzanuddin Shah JC:

PRELIMINARY

[1] As a result of the learned deputy registrar's assessment of damages, two appeals have been filed. The fifth defendant is appealing against the entire assessment, while the first, second and third defendants are appealing against the damages award of RM3,353,603.75 that they must pay to the fifth defendant.

[2] The fifth defendant argues that they are entitled to the entire amount of damages claimed in the sum of RM77,265.883.75 instead of RM3,353,603.75 as awarded by the learned deputy registrar. On the other hand, the first, second and third defendants argue that the fifth defendant is not entitled to anything.

AN OVERVIEW OF THE FACTS OF THE CASE

[3] Here are some facts that led to these appeals.

[4] The dispute arose from a land fraud that occurred during the computerisation exercise at the Federal Territory of Kuala Lumpur land office. As part of the modernisation of land administration, the first defendant was responsible for uploading land details into the computer system from a manual record. This was done to allow computerised titles to be issued as a result of the data transfer. However, a mistake was made affecting the plaintiff's land when the officer in charge entered the fourth defendant's name into the system instead of the plaintiff's. She mistakenly entered 'Liptown Properties Sdn Bhd' instead of 'Uptown Properties Sdn Bhd' when keying in the plaintiff's name. This error was allegedly caused by confusion between the words 'U' and 'L' at the beginning of the plaintiff's name. It turned out that Liptown Properties Sdn Bhd, which was named as the fourth defendant, did not exist.

[5] This error somehow reached the ears of the fraudster, who exploited it to obtain computerised title to the land in dispute. The fraudster then sold the property to the fifth defendant. Following the sale and purchase of the land in December 2004, the plaintiff, as the original owner, became aware of the fraudulent transaction, resulting in a complaint and caveat being registered. Meanwhile, in order to obtain financing for the land's purchase, the fifth defendant charged the land to the sixth defendant.

[6] The plaintiff then filed this civil suit in 2005. Following the trial at the High Court, Dr Prasad Sandosham Abraham J (as His Lordship then was) ordered the land to be returned to the plaintiff. This was due to the negligence of the first defendant. Both the fifth defendant, who was the immediate purchaser, and the sixth defendant, whose role was to finance the purchase, had taken out notices of contribution against the first, second and third defendants as a consequence of such negligence. The notices of contribution were granted by the High Court in favour of the fifth and sixth defendants against the first, second and third defendants, with damages to be assessed by the learned deputy registrar. On appeal, the first, second and third defendants were unsuccessful, as was the application for leave to appeal to the Federal Court. The learned deputy registrar then assessed damages between the parties, resulting in these appeals.

[7] Consequently, these appeals against the learned deputy registrar's assessment of damages only relate to the fifth defendant on one side and the first, second and third defendants on the other. In reference to the sixth defendant, the first, second and third defendants had duly paid them

RM12,286,761.07 under such notice of contribution. Therefore, there is no pending issue as regards the sixth defendant.

[8] In regard to the learned deputy registrar's assessment of damages, here are the damages Her Honour awarded to the fifth defendant:

(a)	Nominal Damages	RM2,000,000.00
(b)	Exemplary Damages	RM500,000.00
(c)	Stamp Duty fees	RM354,000.00
(d)	Legal Fees (SPA and Memorandum of Transfer — MOT)	RM400,000.00
(e)	Legal Fees (Loan Documentation)	RM99.603.7
	TOTAL	RM3,353,603.75

[9] As outlined in the award, the learned deputy registrar disallowed the claim for compensation for the loss of land at market value but granted nominal damages of RM2m. The claim for loss of profit was denied as well. Her Honour, however, allowed exemplary damages of RM500,000 which accounted for 25% of the nominal damages awarded, as opposed to the sum of RM13m claimed by the fifth defendant. The fifth defendant was also allowed to claim stamp duty and legal fees for the SPA, MOT and loan documentation. The learned deputy registrar, nevertheless, decided not to allow interest on damages.

COURT'S ANALYSIS AND FINDINGS

[10] For a better understanding of both counsel's arguments, it is necessary to examine how the learned High Court judge decided when allowing the fifth defendant's notice of contribution against the first, second and third defendants. In this regard, it is helpful to refer to His Lordship's grounds of judgment, duly reported as *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713; [2012] 3 CLJ 271. This is what His Lordship found concerning this issue:

> [30] In my judgment, administrative short comings amounting to negligence and breach of duty cannot justify the plaintiff being dispossessed of its interest in the said land and the fact that it has happened is a violation of the plaintiffs constitutional right under art 13 of the Federal Constitution.
>
> [31] Perhaps in the current climate of the administration of the country and the transformation policy and reforms being carried out by the government, I would be prepared to say that the first defendant owed a duty of care to ensure that by its own mistakes and negligence, the rights of the plaintiff enshrined in art 13 of the Federal Constitution are not rendered nugatory. This court cannot sit back and allow the plaintiff to be deprived of its land. If not checked a landowner who takes comfort in the document of title he holds, could have his rights be taken away from him 'nilly willy'.

[32] In the light of my finding, I am of the view there was no necessity to deal with the question of bona fide purchaser for value.

[33] On that basis I allowed the notice of contribution for the fifth and sixth defendants against the first, second and third defendants with damages to be assessed by the *Timbalan Pendaftar*. It must be shown that the breach of duty of the first, second and third defendants owed to the fifth and sixth defendants was the foreseeable cause and causally by itself caused the damages suffered particularly by the sixth defendant. The whole transaction would have to be examined carefully and its short comings particularly the Suruhanjaya Syarikat Malaysia ('SSM') in registering a nonexistent company in its registry and the role of the solicitors in this transaction.

[11] Based on the examination of the learned trial judge's decision, the following is my understanding of His Lordship's findings. His Lordship had allowed the fifth and sixth defendants' notices of contribution against the first, second and third defendants with damages to be assessed. For the purpose of assessing damages, proof must be provided in terms of the type or head of damages, followed by the quantum of damages. This aspect of His Lordship's decision is not indicative of the need that the issue of merits should be revisited again, more so at the assessment stage before the learned deputy registrar. Therefore, when it comes to liability, there is no revisiting of the merits issue. This was a matter for the learned trial judge to determine.

[12] Taking this perspective into account, a merits analysis now needs only to be conducted to determine whether damages were actually suffered, and, if so, their quantum. As the learned trial judge had already determined, the first, second and third defendants did owe a duty of care to the fifth and sixth defendants. It was also made clear by the learned trial judge that there was no necessity to deal with the issue of a bona fide purchaser for value. There should be no doubt about those findings by now.

[13] The only point in which I agree with the learned senior federal counsel is that the learned trial judge has yet to decide on the head of damages recoverable and the question of remoteness as well as contributory and apportionment related specifically to damages. However, I cannot agree with the approach taken by the learned senior federal counsel when he argues at length on the merits of liability, which should have been resolved by now and should no longer be a concern, especially when the issues have been ventilated at trial up to the point where leave to appeal to the Federal Court had been refused.

[14] This specific issue is therefore no longer paramount when assessing damages. Therefore, when the learned senior federal counsel argues on the issue of unconscionable conduct on the part of the fifth defendant, the learned

A senior federal counsel is encroaching on the question of the fifth defendant's position as a bona fide purchaser for value and on the merits of the case. This is particularly true when the learned senior federal counsel argues that if the court agrees with him, the fifth defendant will not be able to recover any loss or damages. It is evident from the learned senior federal counsel's arguments that B he is attacking again the issue of forgery by pointing out the bizarreness of the disbursement of the loan as well as the evidence during the trial that appeared to have involved the element of fraught with tell-tale signs of active participation in or knowledge of the fraud, which, according to the learned senior federal counsel, remains inexplicable and unanswered by the fifth C defendant.

[15] Concerning this particular issue, the Court of Appeal had the opportunity to address the point that the question of liability cannot be reopened during the assessment of damages. In *Maju Holdings Sdn Bhd* D *v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 1 MLRA 832, Abdul Kadir Sulaiman JCA (as His Lordship then was) made the following observations at p 117 (MLJ); p 842 (CLJ):

> [28] The trial judge had rightly entered interlocutory judgment in favour of E Regalion Investments Ltd, the respondent in Civil Appeal No W-02–964 of 2001 and also ordered that the senior assistant registrar or the deputy registrar of the High Court to proceed to formally assess the general damages and/or other ancillary relief as prayed for by the respondent. Since interlocutory judgment has been entered the question of liability of the appellant to Regalion Investments Ltd has been conclusively determined with finality and therefore the issue of liability of the F appellant cannot be re-opened or re-agitated by the appellant during the assessment of damages. The duty of the senior assistant registrar or deputy registrar of the High Court is strictly confined to assess the quantum of damages that is payable by the appellant to Regalion Investments Ltd. This is strictly a mathematical exercise involving the calculation of the total option price of the option shares and deducting the value of the force sold shares, if any. G

[16] As a final note on this issue, it also appears to me that these submissions of the learned senior federal counsel constitute *res judicata.*

H **[17]** The next step is to determine whether the fifth defendant is entitled to the damages asked for and, if so, what quantum of damages it should receive.

[18] After reviewing the learned deputy registrar's grounds of judgment, Her Honour concluded that the fifth defendant had failed to prove that they were I entitled to claim for the loss of land at market value. Furthermore, Her Honour found that the fifth defendant's claim was based on unjust enrichment and double recovery against the first, second and third defendants. The fifth defendant was nevertheless subsequently awarded nominal damages of RM2m under the general principle of damages.

[19] Bringing my attention back to the appeals before me, the fifth defendant argues that it is entitled to the market value of the land as of 31 January 2012. This is the date the learned trial judge rendered His Lordship's judgment. Meanwhile, the first, second and third defendants argue that even if the fifth defendant is entitled to claim under this head of damages, the fifth defendant can only claim based on the value of the lost land that should have been determined on 14 September 2004 being the date the fifth defendant and the fourth defendant signed the sale and purchase agreement ('SPA').

[20] In this regard, I am of the considered view that the fifth defendant is only entitled to claim the market value of the land at the time of signing the SPA rather than the date of judgment after trial. As a general rule of law, I agree that damages recoverable must be assessed at the date when the tort was committed, which in this case was on 14 September 2004.

[21] In *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105; [1985] 1 MLRA 479, the Privy Council, through the judgment of Lord Keith of Kinkel at pp 113–114 (MLJ); pp 492–493 (MLRA), held that damages are generally assessed at the time the tort was committed unless certain exceptions apply that require damages to be calculated up to the date of trial:

> It was further argued for these appellants that Abdul Razak J was wrong to include in the damages any sum in respect of the increment in value which he held would have accrued to the land, had the appellant not been wrongfully deprived of it, between the date of the deprivation and the date of judgment, and in any event that the increment of 140% had no evidential basis and was unjustified. No doubt it is a general rule of law that the damages recoverable for a tort are to be assessed as at the date the tort was committed. But there are many exceptions to that rule, the most notable perhaps being the case of damages for personal injuries caused by negligence, which are assessed so as to take into account all loss suffered up to the date of trial having regard to the value of money at that time. The true test is what is just and reasonable in all the circumstances. The object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed. In the present case there is no reason to doubt that if the respondent had not been tricked out of her land she would at the date of judgment still have been in ownership and possession of it bearing the value which in ordinary course it would have borne at that time. Further, if these appellants had not succeeded in bringing it about that the land was sub-divided into 70 lots and sold off to bona fide purchasers for value, the respondent would have been entitled to have the transaction with her set aside and to recover the land itself on the date that judgment was pronounced. So in their Lordships' opinion the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment. Special considerations might have arisen if the respondent had been guilty of unreasonable delay in prosecuting her claim, but no suggestion of that has been made.

[22] In light of *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105; [1985] 1 MLRA 479, I do not find any exception to the general rule of law defined in that case applicable here in order to justify the value at the time of judgment. In my opinion, I am obligated to deliver justice to those who were wronged and the wrong occurred on 14 September 2004.

[23] Here are the reasons why I draw this conclusion. In this case, it was not long before the fifth defendant became aware of the fraud. This is due to the fact that they knew or should have known from the moment the caveat was entered that the transaction was forged, particularly since the land was caveated by the first defendant. It is undeniable that due to the ongoing dispute over the land, the fifth defendant put off the pursuit of the development order. The obvious is that ever since the dispute started, the registrar's caveat had already been entered over the property.

[24] Here, the fifth defendant was not tricked out of his property or land. If such a scenario were to occur, it would logically rob the innocent landowner of his right to retain the land for a long time and the ability to sell the land at a high price when the market price is high. The appeals before me, however, are quite the opposite. In this case, it was almost immediately apparent to the fifth defendant that the fraud had taken place when they bought the land in question. This means that it cannot be based on the judgment date. It has to be the date when the fifth defendant was led to believe that the transaction was legitimate and valid. The extent to which the fifth defendant was unaware of the fraud only lasted for that time period. In this instance, the fifth defendant was only the purchaser of the land. Referring back to my illustration, in the former scenario, it would be considered deceitful, whereas in our case, it would be considered a tort of misstatement. Considering the government was held liable for the tort of misstatement, I find that the breach occurred at the time of signing the SPA.

[25] After having reached such a conclusion about the exact timing of the assessment of the land value, I am left with the obvious question of which valuation reports should I consider when determining the land's value in 2004. There appear to be four valuation reports that were made post-judgment. Firdaus & Associates prepared a valuation report dated 22 May 2012 for the value of RM70m, followed by Raine & Horn's valuation report dated 25 November 2013 for RM62.5m. They were both made for the fifth defendant. Following that, the Valuation and Property Services Department ('JPPH') prepared its rebuttal valuation reports dated 27 January 2017 and 10 June 2015 confirming that the market value of the land as at 31 January 2012 was RM21.5m. Having this issue at the forefront of my mind, I must decide whether to rely on any of the valuation reports or hold that the fifth defendant has failed to prove their losses.

[26] While conducting this exercise, I became aware that there was a valuation report dated 7 July 2004 prepared by Firdaus & Associates for RM15m regarding the same plot of land back then. This valuation was prepared to determine the value of the land for the parties to enter into the SPA. This information was derived from the submissions of the learned senior federal counsel. In this instance, the learned senior federal counsel argues, alternatively, that even if the court finds in favour of the fifth defendant, the valuation ought to be based on 14 September 2004, the date when the SPA was signed. The learned senior federal counsel further compares the whole valuation and pricing records provided to the parties at the time of the SPA. They were the valuation report dated 7 July 2004 by Firdaus & Associates in the amount of RM15m, the valuation report dated 14 September 2004 of RM9,265,000 by JPPH, loan offer of RM10.5m made by the sixth defendant against the said land as collateral and the selling price of RM12m agreed upon between the fifth defendant and the fourth defendant (out of this, RM7.5m was actually paid by the fifth defendant to the fourth defendant after deducting RM4.5m paid to the broker). Those documents were presented to the court as evidence. Taking this matter further, as I analyse the fifth defendant's position, I must keep in mind that there has to be some kind of profit for them being the innocent party as a result of this entire episode.

[27] Based on my analysis and balancing of the evidence before me as well as the overall circumstances of the facts relating to both appeals, I have come to such an inclination towards the valuation report prepared by Firdaus & Associates dated 7 July 2004 for RM15m. Taking this into consideration, I observe that JPPH's value appears to be the lowest among all the quantum figures available in 2004. It is, however, an amount that I do not accept, as at the end of the negotiations between the fourth defendant and the fifth defendant, RM12m was ultimately agreed upon by both parties. Due to this, the sum of RM9,265,000 as valued by JPPH does not represent the correct value on which the parties agreed when completing the SPA. As I compare both valuation reports prepared by JPPH and Firdaus & Associates, I am of the opinion that the valuation report by Firdaus & Associates represents a more reasonable and appropriate basis due to the fact that the fifth defendant must be placed in a position corresponding to what they would have been if the tort had not occurred. Moreover, the fifth defendant appears to have only relied on valuation reports that were made in 2012 and 2013. Having said that, it is important to note that this approach is derived from the specific circumstances of the positions taken by the parties and the facts of the appeals before me, as I have just mentioned, including the alternative arguments by the learned senior federal counsel who put an option between the Firdaus & Associates and JPPH valuation reports both of which were prepared in 2004. It goes without saying that the learned senior federal counsel prefers the JPPH's valuation report.

[28] Continuing with the same issue, I respectfully disagree with the learned deputy registrar's findings that despite the fifth defendant's failure to prove damages, Her Honour nonetheless proceeded to award nominal damages of RM2m. As seen from my perspective, the appeals before me do not appear to be such a case where the fifth defendant failed to prove damages or where there was no evidence for the court to consider. It is unavoidable that the fifth defendant suffered losses as a result of this whole affair. As far as this issue is concerned, I have a number of valuation reports, not only the ones from 2004 but also those from 2012 and 2013 demonstrating the quantum of losses. Firdaus & Associates prepared a report dated 22 May 2012 for the value of RM70m, Raine & Horn for the value of RM62.5m on 25 November 2013 and JPPH for the amount of RM21.5m reflecting the value as at 31 January 2012. With these figures in hand, I am now in a better position to make a more informed decision. Consequently, this led me to compare the quantum figures and arrive at the most reasonable and acceptable amount, based on my own assessment. Moreover, since I do not use the date of the judgment as a basis for determining the value, I have figures from 2004 to refer to.

[29] The following issue also comes to mind. As argued by the learned senior federal counsel, the fifth defendant received the land free of charge since the first, second and third defendants had already paid the sixth defendant. However, as I understand it this is not the case as the fifth defendant received no land since the fifth defendant had to convey it back to the plaintiff. It is therefore necessary to compensate the fifth defendant since the SPA cannot be treated as a pointless exercise.

[30] There is another issue I need to address. The fifth defendant cannot claim the market value of the land of RM52m and then also demand damages for lost profits of RM11.4m on the ground that the opportunity to develop the land was lost. It is my finding that there can be only one claim in this affair. As the fifth defendant has already claimed for the loss of value, it cannot now claim for the loss of profit. In this regard, there are only two possible outcomes, either the land is sold or it is developed by the fifth defendant. In the specific circumstances of this case and the manner in which the fifth defendant is claiming, it is not possible to claim both damages concurrently. Furthermore, the idea of selling and redeveloping the land once again is too remote. If the fifth defendant is allowed to claim as such, the recovery would be double, aside from the fact that it would also be unjust enrichment on its part.

[31] In light of the whole analysis above, I conclude that the fifth defendant is entitled to some form of damages for the wrong that was committed against it. To this end, my calculation of the damages payable to the fifth defendant is as follows as opposed to the award of the learned deputy registrar:

(a) loss of value of the land at the time the tort was committed against the fifth defendant: RM15m;

(b) stamp duty: RM354,000;

(c) legal fees (SPA and MOT): RM46,000;

(d) legal fees (loan documentation): RM99,603.75;

(e) as a final step, all the above added amounts are to be deducted from the amount paid to the sixth defendant: RM12,286,761.07; and

(f) interest at the rate of 5%pa from the date of judgment by the learned deputy registrar on 15 October 2021 until the date of full realisation.

[32] Therefore, the total of damages payable by the first, second and third defendants to the fifth defendant is RM3,212,842.68:

RM15,499,603.75–RM12,286,761.07 = RM3,212,842.68

[33] In continuation of this issue and based upon my analysis of the facts leading to the act of forgery, I am not in a position to award exemplary damages since none of the first, second and third defendants' conducts were outrageous enough to warrant punishment by way of exemplary damages.

[34] Additionally, I find that the stamp duty amount of RM354,000 as claimed by the fifth defendant is justified due to the fact that it was incurred by the fifth defendant.

[35] Further, I find that all the legal fees to be reasonable and based my decision on the invoices issued by Messrs Megat Najmuddin Leong & Co as legal fees were payments that had to be incurred in such transactions. However, I have deducted the stamp duty amount of RM354,000 from the legal fees for the SPA & MOT since it has already been awarded as a separate head of damages.

[36] In this regard, it seems to me that even though the fifth defendant is not entitled to buy a new piece of land in 2012, I find that they have nevertheless been sufficiently compensated for the profit of RM3m as awarded. It is an over-the-air profit that does not require any new land to be developed. As a result, the fifth defendant has been placed in the same position as they would have been if the fraud had never occurred (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105; [1985] 1 MLRA 479).

[37] As for the imposition of interest from the date of the award of damages by the learned deputy registrar on 15 October 2021, I find that this is the point at which the precise amount of damages becomes apparent. This is further

supported by the fact that when the learned trial judge allowed the fifth defendant's notice of contribution, the questions of the damages recoverable and their remoteness were still uncertain until the learned deputy registrar delivered the assessment award. Therefore, I take the award date to be the date from which interest will be imposed according to O 42 r 12 of the Rules of Court 2012.

CONCLUSION

[38] As a result of the findings above, I am in effect partially allowing both parties' notices of appeal. Each party, therefore, bears its own costs.

Both parties' notices of appeal partially allowed.

Reported by K Selvaraju